

Exhibit I

PROVING ANTITRUST DAMAGES

Legal and Economic Issues

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**Section of Antitrust Law
American Bar Association**

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the analysis above, even if not on the rationale the court offers, allowing recovery by those who prove a curtailment of their regular purchases could result in excessive liability if overcharge damages are measured in the conventional way.

Because there is no practical way to measure theoretically-accurate damages for the quantity not sold,⁷¹ the choice appears to be either to permit excessive recovery or to impose inadequate liability. This choice, however, assumes that the damage multiple simply reflects the probability of liability being incurred. If the probability is in fact greater than 33 percent, then three times the overcharge on the quantity sold may be an accurate measure of the optimal penalty. If, on the other hand, the probability is equal to or less than 33 percent, then excluding damages for the quantity not sold will result in inadequate deterrence, and permitting recovery of these damages may not be excessive. The resolution of this issue is indeterminate.

B. Vertical Price Fixing

Vertical price fixing cases are likely to be brought either by a direct purchaser from a party to the agreement, usually a customer of a firm at the lowest level of the vertical conspiracy, or by a firm in the distribution chain who accedes involuntarily to the illegal restriction or refuses to accede and is cut off as a result. In either category of cases, assessing potential measures of damages requires an analysis of the explanation for the restraint, bearing in mind that distribution restrictions in theory can serve either to enhance efficiency or to facilitate supra-competitive pricing. In general, customer plaintiffs may suffer compensable injury that can be calculated with acceptable precision; plaintiffs who are present or excluded participants in the restraint are less likely to be able to prove damages.

Vertical price fixing can be associated with supra-competitive prices if the scheme serves to facilitate a dealers' cartel or a suppliers' cartel.⁷²

⁷¹ But see Melanie W. Havens, Michael F. Koehn & Michael A. Williams, *Consumer Welfare Loss: The Unawarded Damages in Antitrust Suits*, 15 U. DAYTON L. REV. 457, 462-63 (1990) (arguing that calculating deadweight loss typically would be easy).

⁷² See, e.g., *Business Electronics Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988); RICHARD A. POSNER & FRANK H. EASTERBROOK, *ANTITRUST*: